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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

CONSOLIDATED EDISON COMPANY OF NEW YORK, LONG ISLAND LIGHTING COMPANY, ORANGE AND ROCKLAND UTILITIES, PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS AND ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, CHAMPION INTERNATIONAL CORPORATION, FEDERAL PAPER BOARD COMPANY, INC., INTERNATIONAL PAPER COMPANY, and WEYERHAUSER COMPANY,

Petitioners,

v.

FEDERICO PENA, SECRETARY OF ENERGY, and GEORGE B. BREZNAY, DIRECTOR, OFFICE OF HEARINGS AND APPEALS, DEPARTMENT OF ENERGY,

and

STATES OF ALABAMA, CALIFORNIA, CONNECTICUT, IDAHO, INDIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, OHIO, SOUTH DAKOTA, VERMONT, WISCONSIN, and WYO[illegible]G,

and

STATES OF DELAWARE, HAWAII, ILLINOIS, KANSAS, NEBRASKA, NEVADA, NORTH CAROLINA, RHODE ISLAND, and WEST VIRGINIA, TERRITORY OF GUAM and THE VIRGIN ISLANDS,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENTS STATES OF ALABAMA, et al., IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION

Did the Court of Appeals correctly affirm the District Court's dismissal for lack of standing of petitioners' challenge to a key provision of a court-approved, congressionally-ratified settlement agreement binding on the Department of Energy, where the agreement gave petitioners an opportunity to share in a limited fund established under the agreement for this purpose, petitioners had no legal right to any funds before the agreement, petitioners did not object to the agreement when it was adopted in 1986, and petitioners are now seeking to expand the size of the fund without any basis in law?

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BRIEF OF RESPONDENTS STATES OF ALABAMA, *et al.*, IN OPPOSITION

Respondents, the States of Alabama, California, Connecticut, Idaho, Indiana, Maryland, Michigan, Mississippi, Montana, Ohio, South Dakota, Vermont, Wisconsin, and Wyoming respectfully oppose the petition of Consolidated Edison, et al., for a writ of certiorari.

COUNTERSTATEMENT OF THE CASE

The Petition for Writ of Certiorari is rife with misstatements of law and fact, all of which attempt to conceal the basic fact about this case which makes it inappropriate for review by this Court. That is, petitioners are attempting to attack a central provision of a court-approved, congressionally-ratified 1986 settlement agreement among the United States Department of Energy ("DOE"), all of the States and territories of the United States, and thousands of private parties. Petitioners chose not to become parties to this agreement, but did not object to its adoption. They benefitted from it by being given an opportunity, previously denied them by court precedent and agency policy, to apply for a share of a portion of funds collected by DOE in connection with the enforcement of its crude oil price control regulations. Now petitioners "seek to strike" (Petition at 8) only the portion of the agreement which specified the size of the benefit conferred upon them, while leaving intact the other elements of that benefit.

The dismissal of this action by the District Court, and its affirmance by the United States Court of Appeals for the Federal Circuit, are absolutely consistent with the decisions of this Court, and with prior decisions of the Courts of Appeals, holding that third parties do not have standing to attack

settlement agreements which are discretionary acts of government agencies, or settlements of which they are beneficiaries, but which do not prejudice their legal rights. Both of these principles apply here to preclude petitioners' suit.

Petitioners are correct that the Federal Circuit, *sua sponte*, supplied another rationale for dismissal apart from the lack of standing relied upon by the District Court. Even if petitioners are correct that in the course of articulating this alternative rationale, the court misapplied certain decisions of this Court, the Federal Circuit judgment is nevertheless correct on the facts here, and the job of this Court "is to review judgments, not to edit opinions."[1] Nothing in the judgment of the Court of Appeals dismissing petitioners' complaints presents the compelling reasons required for invoking this Court's discretionary review.[2]

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[1] Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823 (1985)(Stevens, J., concurring in part and dissenting in part). See also, Helvering v. Gowran, 302 U.S. 238, 245 (1937)("In the review of judicial proceedings the rule is settled that if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason"). The Federal Circuit itself has recently reaffirmed this principle. Koyo Seiko Co., Ltd. v. United States, 95 F.3d 1094, 1099 (Fed. Cir. 1996).

[2] Petitioners' second complaint before the District Court challenged the distribution of funds from the settlement of a particular crude oil enforcement case. See Federal Circuit Opinion, Petition at 19a. Petitioners have not addressed or challenged the dismissal of this complaint in their Petition for Writ of Certiorari. The Federal Circuit affirmed the dismissal of this claim because it was an attack on a settlement agreement, "a matter committed to the discretion of the agency," *id.*, at 21a, precisely the basis it could and should have used

In order to understand the nature of petitioners' claims, and the issues that would be under review if certiorari were granted, it is necessary to understand some basic historical facts about DOE's distribution of crude oil restitutionary funds and the origin of the reserve of a maximum of 20% of such funds for the individual refund proceedings in which the petitioners are refund applicants.

Under the Economic Stabilization Act Amendments of 1971 ("ESA"), sec. 209,[3] and subsequently the Department of Energy Organization Act ("DOEOA"), 42 U.S.C. sec. 7193, the DOE was authorized to bring actions to enjoin and seek restitution for violations of its oil price control regulations. For several years prior to the Final Settlement Agreement ("FSA") in In re Department of Energy Stripper Well Exemption Litigation, M.D.L. 378, ("Stripper Well"),[4] DOE's Office of Hearings and Appeals ("OHA") had conducted restitutionary proceedings pursuant to its regulations found at 10 C.F.R. Part 205, Subpart V ("Subpart V proceedings") to distribute funds collected in connection with DOE's enforcement activities

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to dismiss the complaint at issue here.

[3] Pub. L. No. 92-210, 85 Stat. 743 (1971), former 12 U.S.C. sec. 1904 note. The relevant ESA provisions were later incorporated into the Emergency Petroleum Allocation Act of 1973 ("EPAA") , Pub. L. No. 93-159, 87 Stat. 627, 15 U.S.C. secs. 751-760, and the DOEOA, Pub. L. No. 95-91, 42 U.S.C. sec. 7101, *et seq.*

[4] The FSA was approved by the Kansas District Court in Stripper Well, 653 F. Supp. 108 (D. Kan. 1986). The FSA is reprinted, without its exhibits, in the Appendix submitted to the Court of Appeals (hereinafter "App."), pp. 85-110.

pursuant to ESA sec. 209 and the DOEOA. OHA had developed a set of standards, and a body of administrative case law, concerning refunds to claimants in cases involving regulatory violations in the sale of petroleum products (i.e., the refined products derived from crude oil, as contrasted with the crude oil itself). In some of these cases, OHA had ordered restitutionary distributions of refunds to the States of affected consumers, for use in their energy programs.[5]

However, while Subpart V proceedings had been initiated for some crude oil funds, OHA had never developed standards for determining eligibility for distributions in those cases, and had never ruled on any refund applications.[6] OHA had been unable to develop refund procedures in crude oil cases because of the effect of DOE's Entitlements Program, which operated to spread excessive costs on crude oil first to all the nation's refiners, then down the distribution chain, eventually to all of the nation's ultimate consumers of petroleum products.[7]

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[5] *See, e.g.*, Highland Petroleum, Inc. v. DOE, 798 F.2d 474, 476 (TECA 1986).

[6] See Allerkamp, 17 DOE (CCH) par. 85,079 at 88,170 (1988); "Notice Explaining Crude Oil Refund Procedures," 52 Fed. Reg. 11,737 (April 10, 1987), *reprinted in*, 7 Energy Mgmt. (CCH) par. 90,512 at p. 90,708 (1987).

[7] For an explanation of the operation of the Entitlements Program, see Union Oil Co. v. DOE, 688 F. 2d 797, 802 (TECA 1982), *cert. denied*, 459 U.S. 1202 (1983); United States v. Exxon Corp., 773 F.2d 1240, 1284-84 (TECA 1985), *cert. denied*, 474 U.S. 1105 (1986).

Partially in response to this impasse in the distribution of crude oil funds, Congress in 1982 directed a one time restitutionary distribution of $200 million, much of which derived from crude oil funds, to the States for specified energy-related programs to benefit their citizens who were consumers of petroleum products and thus were injured by violations of the oil price control regulations.[8] During the same period, DOE directed that certain crude oil restitution received as a result of consent orders with violators be paid to the U.S. Treasury or be used for in kind contributions to the federal Strategic Petroleum Reserve.[9]

In 1983, the United States District Court for the District of Columbia held that due to the workings of the Entitlements Program, it was impossible in a crude oil case to "trac[e] ... the overcharges to their ultimate victims and ... calculat[e] ... the damages suffered by each." United States v. Exxon Corp., 561 F. Supp. 816, 853 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (TECA 1985), *cert. denied*, 474 U.S. 1105. The court specifically rejected the option of creating an escrow fund for individual claimants, *id.*, 561 F. Supp. at 855, and instead ordered that over two billion dollars in crude oil restitution be distributed in accordance with the congressional (Warner Amendment) model, *i.e.*, to the States for energy-related programs. *Id.*, 561 F. Supp. at 856. A similar resolution of a crude oil case,

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[8] Section 155 of the Further Continuing Appropriations Act of 1983, Pub. L. 97-377, 96 Stat. 1830, 1919 (1982) ("Warner Amendment").

[9] See, e.g., Consent Order with Standard Oil Co. of Calif., 46 Fed. Reg. 52,221 (Oct. 26, 1981).

directing the funds to state energy programs, was also reached by an Oklahoma District Court, and was likewise affirmed by the Temporary Emergency Court of Appeals ("TECA").[10] United States v. Sutton, 795 F.2d 1040, 1063-64 (TECA 1986), *cert. denied*, 479 U.S. 1030 (1987).

During the time that the appeals in the Exxon and Sutton cases were pending, the court in the Stripper Well case was faced with the distribution of over one billion dollars of crude oil refunds it held in escrow. The District Court judge stated that while he tended to agree with the conclusion in the Exxon case, he could not be certain that it was impossible to identify any injured parties, and referred to OHA the task of attempting to do so. Stripper Well, 578 F. Supp. 586, 594-97 (D. Kan. 1983). After extensive hearings, OHA submitted a report to the court which estimated the level of absorption of crude oil overcharges on an industry-wide basis at the refiner level of the petroleum industry, but concluded that it was impossible to trace the economic harm to particular firms or

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[10] TECA was established by Congress in Sec. 211(b)(2) of the ESA, later incorporated into sec. 5(a)(1) of the EPAA, as the court with exclusive jurisdiction over appeals from the district courts in cases or controversies arising under the ESA or under regulations or orders issued thereunder. In accordance with the Federal Courts Administration Act of 1992, Pub. L. 102-572, 106 Stat. 4506, TECA was dissolved as of April 29, 1993, and its jurisdiction transferred to the United States Court of Appeals for the Federal Circuit. TECA had interpreted its statutory authorization as "issue jurisdiction," meaning that it generally decided only the ESA/EPAA issues in a case. The Federal Circuit adopted TECA precedent and practice on jurisdictional matters, Texas American Oil Corp. v. DOE, 44 F.3d 1557, 1563-64 (Fed. Cir. 1995), and on substantive matters as well. *Id.* at 1561.

individuals.[11] DOE submitted a separate statement to the court, which concluded that, based on the OHA Report, "individual proof of harm is ... shown to be impossible,"[12] and thus recommended to the court that Congress be allowed to direct the appropriate distribution of crude oil funds. If Congress had not acted by the fall of 1986, DOE recommended that the funds be placed in the general fund of the U.S. Treasury. *Id.*, at p. 90,646.

Subsequently, negotiations began among the DOE, the fifty States, and groups representing various levels of the petroleum industry (refiners, resellers, and retailers), as well as representatives of several large groups of end users of petroleum products, including utilities and surface transporters, to settle globally not only the Stripper Well case but other pending litigation regarding the oil price control program and the distribution of all future crude oil funds. As is evident from the foregoing history, at the time of these negotiations, both TECA's rulings and DOE's policy had confirmed that individual claims proceedings in crude oil cases were neither legally required nor administratively practicable, and had instead relied on indirect restitution through governmental distributions to compensate the consuming public.

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[11] "OHA Report on Stripper Well Overcharges," *reprinted in*, 7 Energy Mgmt. (CCH) par. 90,507 at p. 90,639, 90,641(1985). Thus, Petitioners' claim that the OHA study eliminated the impossibility of determining individual injury in crude oil cases, Petition at 5, n.2, is incorrect.

[12] Statement of Restitutionary Policy of the Department of Energy, 50 Fed. Reg. 27,400 (July 2, 1985), *reprinted in*, 7 Energy Mgmt. (CCH) par. 90,508 (1985) at p. 90,644.

The negotiations culminated in the Final Settlement Agreement approved by the Stripper Well court in 1986. In keeping with prior congressional action, case law and DOE policy, the FSA directed that the bulk of crude oil funds be distributed to the state governments for their energy programs and to the U.S. Treasury, as restitution to the nation's many millions of household and business consumers of petroleum products. The States and the federal government received substantial funds from the Stripper Well escrow, and also were to receive at least 40% each of all current and future DOE-held crude oil funds.

Notwithstanding TECA's prior rulings and DOE's 1985 Statement of Restitutionary Policy, both of which rejected an individual refund process in favor of governmental distributions, the FSA also provided that OHA could "reserve a reasonable portion of [crude oil] funds... to satisfy potentially provable claims of identifiable injured claimants ..., *but such reserve shall not exceed 20 percent of the monies in such proceeding.*" FSA IV.B.6, App. 106 (emphasis supplied). The 80% or more of DOE-held crude oil funds not so reserved was to be distributed, as soon as received by DOE, to the States and the federal government, as indirect restitution to all consumers. *Id.*. Nothing in the FSA permitted the 20% reserve to be increased by DOE, although the Agreement did allow the reserve to be adjusted downwards. *Id.*. No allocation formula for those seeking a share of the reserve was established or even mentioned in the FSA.

After court approval of the FSA, as required by FSA IV.B.1, App. 104, DOE published a Modified Statement of

Restitutionary Policy, ("MSRP"),[13] which vacated the prior Statement of Restitutionary Policy submitted to the Stripper Well court. The terms of the MSRP were mandated by the FSA and the court order approving the FSA.[14] The MSRP states:

> This policy will be implemented by equally distributing to the States, and to DOE for deposit in the Treasury, eighty percent of all crude oil funds. The remaining twenty percent will be set aside for claims of direct injury. The balance remaining after the ... [claims] stage is completed will also be paid to the States and DOE.[15]

Subsequently, following notice and comment proceedings, OHA issued a "Notice Explaining Crude Oil Refund Procedures."[16] Consistent with the MSRP, the Notice applies only to the up to 20% of crude oil funds available for distribution by OHA to individual applicants. 7 Energy Mgmt. (CCH) par. 90,512 at p. 90,707. In that Notice, OHA indicated its intention to apply a "volumetric" allocation formula for calculating the crude oil refund applicants' shares of the available funds. *Id.*, at p. 90,711. It is this OHA allocation formula upon which petitioners base their claim on the merits here, claiming that the formula for allotting the 20% reserve

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[13] 51 Fed. Reg. 27,899 (August 4, 1986), *reprinted in*, 7 Energy Mgmt. (CCH) par. 90,508A (1986).

[14] Stripper Well, *supra*, 653 F. Supp. at 114; MSRP, 7 Energy Mgmt. (CCH) par. 90,508A at 90,674-5: "This Statement is part of the implementation of the terms of the [FSA] Agreement...".

[15] *Id.*, at pp. 90,647-6 - 90,647-7.

[16] *Supra*, n. 6.

somehow requires that more than 20% of crude oil funds be distributed to individual crude oil applicants, at the expense, of course, of the 80% required to be distributed as indirect restitution through the States and the federal government.

In fact, however, ever since the allocation formula was established, DOE has recognized that the formula is intended solely to allocate the fund available to crude oil applicants, i.e., the maximum of 20% required by the FSA, and cannot operate to expand that amount in violation of the FSA. See, *id.*, at pp. 90,710 and 90,711, n. 1.

Moreover, TECA approved OHA's allocation formula for the claims fund as a permissible exercise of DOE's discretion, as long as it operated as OHA intended, *i.e.*, within the 20% reserve. Stripper Well, 857 F.2d 1481 (TECA 1988). TECA stated:

> Under the FSA only 20 per cent of moneys in other [than the Stripper Well] escrow accounts are available for distribution in these proceedings....
>
> What the States are entitled to under the FSA is secure. All that OHA's formula affects is the amount that individual end users will receive in refunds out of the 20 per cent set aside to settle their claims.

Id., 857 F.2d at 1484 (emphasis in original).

REASONS FOR DENYING THE WRIT

I. Petitioners Lack Standing To Attack a Provision of the FSA, Whose Adoption Was an Exercise of DOE's Discretion, and Which Did Not Impair Their Existing Rights, But Only Conferred a Benefit Upon Them

The District Court and the Federal Circuit reached the correct result when they dismissed this case. Petitioners are attempting to attack a term of a court-approved and congressionally-recognized[17] settlement agreement, which provided them a benefit to which they had no legal entitlement. Petitioners' attempted attack on the FSA is barred, both 1) because it challenges a settlement entered into as an exercise of DOE's discretionary authority to settle enforcement matters, including the distribution of restitutionary proceeds, and 2) because third parties have no standing to attack a settlement agreement which does not impair their existing rights. The FSA does not do so.

First, the dismissal of these actions implements the holdings of Heckler v. Chaney, 470 U.S. 821 (1985) and its progeny, *e.g.*, New York State Dept. of Law v. FCC, 984 F.2d 1209 (D.C. Cir. 1993), that the dismissal or settlement of agency enforcement proceedings without a ruling on the merits

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[17] *See*, Petroleum Overcharge Distribution and Restitution Act of 1986 ("PODRA"), 15 U.S.C. sec. 4501 *et seq.*, at secs. 4501(c)(2) and 4502(a)(2).

is unreviewable, because there is no "law to apply" to such decisions, which are akin to "prosecutorial discretion."[18]

The Federal Circuit has explicitly applied this principle in an oil price control case involving a challenge to OHA's decision as to how to apportion refund monies. Mullins v. DOE, 50 F.3d 990 (Fed. Cir. 1995). The Federal Circuit rejected the challenge to OHA's decision, holding that

> the call regarding whether to settle and on what terms nevertheless would remain one peculiarly the province of the executive, and not the judiciary. Much like the decisions of prosecutors regarding who to prosecute and who not, some decisions simply do not lend themselves to traditional notions of judicial review.

50 F.3d at 993 (footnote omitted).

Second, as non-parties who are benefitted by the FSA, petitioners have no standing even to enforce the FSA, much less attack it. Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 750 (1975). *See also*, Rafferty v. NYEX Corp, 60 F.3d 844 (D.C. Cir. 1995)(Unless a government consent decree

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[18] Of course, a settlement agreement or other arguably discretionary agency action may be challenged (by a proper party, at an appropriate time) on the ground that it violates a constitutional, statutory or regulatory command, or other legal obligation, in which case there obviously would be "law to apply." *E.g.*, Davis Enterprises v. EPA, 877 F.2d 1181, 1185 (3rd Cir. 1989); Edison Electric Institute v. EPA, 996 F.2d 326, 333 (D.C. Cir. 1993). Petitioners, however, made no such timely challenge to the FSA, and have in fact attempted to disguise the fact that they are attacking the FSA at all. See Part II, *infra*.

stipulates that it may be enforced by a third party, only the parties to the decree may seek enforcement of it.)[19] A third party is "aggrieved" by a settlement agreement so as to confer standing to attack the settlement only if "its substantive provisions unlawfully infringed upon the rights of the complainant." Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479, 484 (6th Cir. 1985), *aff'd sub nom*, Firefighters v. Cleveland, 478 U.S. 501 (1986).

Petitioners may not attack the FSA because it did not impair any existing rights they had. The FSA, *for the first time*, offered individual petroleum product users who were not parties to the FSA,[20] such as the petitioners, the opportunity to apply for a share of a stated portion of the funds collected by DOE in crude oil cases. Prior to the FSA, TECA had ruled that such an opportunity was neither legally required nor administratively practicable.[21] As the District Judge noted when he approved

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[19] The FSA specifically provides that no enforcement rights are conferred on non-parties. FSA VI.B, App. 109.

[20] The non-governmental parties to the FSA all received distributions from the Stripper Well escrow and waived the right to any refunds in the individual claims process to be established for the 20% reserve. Stripper Well, 653 F. Supp. at 114.

[21] Petitioners claim that Texas American Oil Corp. v. DOE, *supra*, holds that PODRA "eliminated the precedent of ... settlements" such as Exxon where "DOE had distributed refunds to the States." Petition at 6-7, n. 3. To the contrary, Texas American states that PODRA reflects the disposition in Exxon in directing "the major portion of the ESA section 209 recovery ... to the states and the general fund of the United States Treasury." 44 F.3d at 1568. In any event, Exxon was not a settlement in which DOE distributed funds to the

the FSA, but for the Agreement, he could have "direct[ed] all of the funds to the United States Treasury and the States." Stripper Well, *supra*, 653 F. Supp. at 117. Prior to the FSA, DOE had never granted a single individual refund from crude oil funds, and its policy was either to allow Congress to legislate the disposition of such funds, or to make governmental distributions as indirect restitution.

Thus, the policy adopted by DOE in accordance with the FSA burdened no existing rights of petitioners, but only conferred a benefit upon them. It gave them something they never had before, as to which they had no legal entitlement, and defined both the amount of the available fund and the procedures for obtaining a share of it. Petitioners have no standing to attack it.

TECA has applied these principles in numerous cases, some of which were relied upon by the District Court in denying standing here, to hold that private third parties do not have standing to attack settlements of DOE oil price control enforcement proceedings, even where they are potential distributees of the settlement funds. E.g., Payne 22, Inc. v. United States, 762 F.2d 91, 93-94 (TECA 1985); Highland Petroleum v. DOE, *supra*, 798 F.2d at 477, 478 ("the general rule [is] that non-parties may not challenge or enforce consent orders directly or in collateral proceedings.... [I]nvalidat[ion of] a term of the consent order [would be an] intolerable result"); Midwest Petroleum v. DOE, 760 F.2d 287, 290 (TECA

States, but a court judgment in which the court determined to achieve restitution entirely through the States, to the exclusion of any claims process whatsoever.

1985)("The mere fact that the option [provided by the consent order] was not as favorable to plaintiffs as they would have wished ... does not mean they suffered any loss as a result of the Consent Order.")

Additionally, even apart from these barriers to this case, petitioners, who chose not to participate in the FSA nor to object to the 20% limit, cannot bring a collateral challenge a decade later.[22] The States and the federal government gave up their claims to 100% of crude oil funds, and allowed thousands of other parties to receive funds from the Stripper Well escrow, in part in return for the guarantee that they would receive at least 40% each of future crude oil funds collected by DOE. Changing one of the Agreement's essential terms now to reduce the governmental shares would irrevocably upset the balance struck in the Agreement, impermissibly disturbing the finality of the Stripper Well court's judgment. EEOC v. Pan American World Airways, Inc., 897 F.2d 1499, 1509 (9th Cir. 1990), *cert. denied*, 498 U.S. 815 (potential parties who chose not to participate in lawsuit have no standing to challenge the terms of

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[22] The FSA was subject to repeated public scrutiny and comment prior to its adoption by the Kansas District Court, Stripper Well, *supra*, 653 F. Supp. at 118, 119, and no one objected to the 20% limitation. All of the petitioners were members of one of the end-user groups eligible for refunds from the Stripper Well escrow itself under the Agreement. The utilities, for example, could have obtained funds from the utility escrow. *Id.*, 653 F. Supp. at 112; FSA II.B.g. They obviously decided to forego their allotted shares under the FSA in order to claim in the crude oil Subpart V proceedings, knowing that those proceedings were limited by the FSA to 20% of crude oil funds. They did not attempt to intervene in the Stripper Well proceedings, or even submit comments to the court, in order to protest the size of the reserve.

the settlement agreement); United States v. Boch Oldsmobile, Inc., 909 F.2d 657, 661 (1st Cir. 1990)("alteration of the consent decree... [three years after its entry] is inconsistent with the principle of finality of judgments"); *cf.*, Ackerman v. United States, 340 U.S. 193, 198 (1950)("There must be an end to litigation someday, and free, calculated, deliberate choices are not to be relieved from.").[23]

In sum, the judgment in this case, dismissing petitioners' attempt to strike the FSA's 20% limit for the reserve created for individual crude oil applicants, is entirely consistent with the precedents of this Court, the Circuit Courts of Appeals, and of TECA, the specialized court created by Congress to rule on actions under the oil price control program.

II. The Petition Misstates The Relevant Facts and Law.

The Petition makes several misstatements of fact and law, as well as crucial omissions of important facts and precedents, which conceal the basic truth about this case which makes it inappropriate for Supreme Court review.

First, and most crucial, petitioners have failed to disclose that the limitation to a maximum of 20% of crude oil funds to be made available in the DOE individual claims process was mandated by the FSA, to which DOE was bound and which was approved by the Stripper Well court and recognized by Congress. Instead, petitioners claim that the "sole basis" of the 20% limitation was an "estimate" by the States and DOE which

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[23] The FSA has a stronger claim to finality even than the usual court judgment, since it was also endorsed by Congress in PODRA.

has been "proven wrong." Petition at 8-9. In fact, the plain language of the FSA, as recognized by DOE itself as well as TECA (see p. 10, *supra)*, makes the 20% limit an absolute cap on the amount that is available for distribution to individual claimants.

By claiming that the 20% limit was a mere "estimate," petitioners attempt to conceal the fact that they are attacking a mandatory term of a court-approved settlement agreement.

Second, petitioners claim that the initial allocation formula developed by DOE to apportion the then-available funds from the 20% reserve gave them an entitlement to more than the 20% reserve. Petition at 3-7. As described above, p. 10, however, DOE always intended the formula to operate within the 20% mandated by the FSA, and TECA approved the formula on that basis.[24]

Rather than attempting to enforce a DOE policy (the allocation formula), in fact petitioners are attempting to frustrate DOE policy adopted pursuant to a mandatory term of a court-approved settlement agreement to which they did not object, and upon which their entire claim to any funds depends.

Next, petitioners contend that PODRA supports their claim. Petition at 6, 25-26. Petitioners, however, fail to disclose that PODRA applies exclusively to funds *not* governed

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[24] Petitioners cite the TECA case (Stripper Well, 857 F.2d 1481 (TECA 1988)) which unequivocally established that the DOE formula could not expand the 20% reserve, but fail to mention that aspect of TECA's ruling. Petition at 7.

by the Stripper Well Agreement, *i.e.*, petroleum product, as opposed to crude oil, funds. See PODRA, 15 U.S.C. secs. 4502(a)(2) and 4501(c)(2); Getty Oil v. DOE, 865 F.2d 270, 276 (TECA 1988)(footnote omitted):

> PODRA dictates the method of distribution of funds covered by the Act. The legislation itself specifically excludes from its coverage any funds governed by the Stripper Well agreement.

Thus, the reality is that PODRA, which excludes funds governed by the FSA from its coverage, can in no way support petitioners' claims on the merits or supply them with a cause of action or standing. On the contrary, PODRA supplies a congressional endorsement and ratification of the Stripper Well Agreement, which, of course, limits the reserve for individual claimants to a maximum of 20% of crude oil funds.

III. Petitioners' Speculation as to the Application of the Federal Circuit's Rationale in Future Cases Does Not Warrant This Court's Review

As we have shown, the result reached by the Federal Circuit in this case, dismissing petitioners' claims, was correct and consistent with all relevant precedent. Petitioners argue, however, that the Federal Circuit's rationale supporting dismissal might be applied in future cases to achieve results which are legally erroneous and inconsistent with existing precedent. Petition at 16-18. An incorrect rationale for a correct decision is not cause to invoke this Court's discretionary review, see p. 2 and n. 1, *supra*, and speculation as to how that rationale might be applied to reach wrong results in future cases does nothing to aid petitioners' case. If and when such future purported miscarriages of justice occur, this Court can decide,

in the context of a real, concrete controversy, whether review is warranted in such a case.

IV. There Is No Conflict Between the Decision Here and Prior Decisions of the Lower Courts

Petitioners incorrectly claim that the decision in this case conflicts with prior decisions of the Federal Circuit, TECA and the District Courts. Petition at 18-29. These earlier decisions present entirely different issues from those presented in this case, and thus pose no conflict. None of these cases involves, as does this one, an attack on a provision of the court-approved, congressionally-endorsed settlement agreement which governs the DOE crude oil refund process.

Petitioners rely first on purportedly "conflicting" decisions which permit interested parties to participate in administrative enforcement proceedings before DOE, Petition at 19, obviously a totally different issue from petitioners' standing to attack a term of a court-approved settlement agreement which conferred upon them a new benefit.

Next, petitioners rely on cases which permit applicants for a portion of available DOE restitutionary funds to challenge complete or partial denial of their refund applications. Petition at 20-24, 26-29. Likewise, these cases are not relevant to the claim asserted here. When Subpart V refund applicants challenge decisions on their individual refund applications, they are asking the courts to apply the DOE Subpart V regulations to the facts of their own refund claims, or to determine whether DOE's decisions in Subpart V proceedings are supported by substantial evidence. In some of the cases relied upon by petitioners, refund applicants challenged DOE's interpretation

of certain terms of the FSA as applied to their refund claims. E.g., Burlington Industries v. Watkins, 916 F.2d 722 (TECA 1990). In all such cases, the courts could measure OHA's decisions against appropriate legal standards, *i.e.*, the controlling regulations, the FSA, or the substantial evidence test.

Here, in contrast, petitioners do not rely on any controlling DOE regulations, and do not merely quarrel with DOE's interpretation of a term of the FSA applicable to their own refund applications. Instead, they ask that a necessary term of the FSA be stricken. DOE has no authority to do what petitioners seek. DOE's decision to enter into the FSA was, as the Stripper Well court and Congress found, within its discretion, and DOE was and is required to implement the mandatory terms of this court-approved settlement. Unlike the plaintiffs in the cases they rely upon, these petitioners have not, and cannot, claim that DOE's actions are improper as measured against any applicable legal standard. The only "standard" relied upon by petitioners, the DOE allocation formula, cannot possibly provide petitioners with a claim to more than 20% of crude oil funds, since that formula is required to operate within the 20% reserve.

Finally, petitioners also rely on Texas American, *supra*, for its description of PODRA, which, as discussed above, does not apply to crude oil funds governed by the FSA. Nothing in PODRA, and nothing in Texas American, which concerned solely the bankruptcy classification of certain DOE restitutionary funds, has any relevance here.

In sum, none of the cases cited by petitioners presents a clear conflict which needs to be resolved by this Court.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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